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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
--X

RONALD D. CORWIN, et al.,

Plaintiffs,

-against-

NYC BIKE SHARE, LLC, et al.,

Defendants.

--X

14-CV-1285 (SN)

OPINION & ORDER

SARAH NETBURN, United States Magistrate Judge:

Familiarity with the factual background of this case is assumed. On March 1, 2017, the Court issued an Opinion and Order on the parties' cross-motions for summary judgment. Corwin v. NYC Bike Share, LLC, No. 14-CV-1285 (SN), 2017 WL 816134 (S.D.N.Y. Mar. 1, 2017). With the exception of defendants Alta Planning + Design Inc. and Alta Planning + Design + Architecture of New York, PLLC, (collectively, "APD") who were granted summary judgment on plaintiffs' claim, every remaining party has moved for some form of relief from this decision.[1]

Defendants Metro Express Services, Inc. ("Metro Express") and Sealcoat USA, Inc. ("Sealcoat") move for reconsideration under Federal of Rule of Civil Procedure 54(b) and Local Civil Rule 6.3 and for leave to amend their answers to include affirmative defenses based on the release in the CitiBike User Agreement ("Agreement"). ECF No. 400. In the Opinion and Order, the Court held that the Agreement released plaintiffs' claims against Motivate International (f/k/a

[1] APD's motion for summary judgment as to all cross-claims filed by defendants shall be addressed in a separate Opinion and Order.

Alta Bicycle Share, Inc.) and NYC Bike Share, LLC; however, because Metro Express and Sealcoat never asserted the Agreement as an affirmative defense in their answers and did not address the issue in their summary judgment briefing, the Court did not consider its applicability to these parties.

Defendants Motivate International and NYC Bike Share, LLC (collectively, "NYCBS") move for reconsideration under Federal of Rule of Civil Procedure 54(b) and Local Civil Rule 6.3 of the March 1, 2017 Opinion and Order to the extent that it denied summary judgment to NYCBS on plaintiffs' claims of gross negligence. ECF No. 402. The Court found that summary judgment was inappropriate because a reasonable factfinder could conclude that NYCBS's conduct was sufficiently reckless and/or aggravated to meet the gross negligence standard. Corwin, 2017 WL 816134, at *28. Defendants Metro Express and Sealcoat filed a notice of joinder in this motion for reconsideration. ECF No. 406.

Plaintiffs Ronald D. Corwin and Beth Blumenthal (collectively, "Corwin") move for reconsideration under Federal of Rule of Civil Procedure 54(b) and Local Civil Rule 6.3 of the March 1, 2017 Opinion and Order on two primary bases: (1) that the enforcement of the CitiBike User Agreement against Corwin is improper because a proper reading of the Agreement indicates that it does not apply to street treatments such as wheel stops; and (2) the Agreement is unenforceable as to NYCBS because New York City Administrative Code § 19–110 provides Corwin a private right of action that cannot be waived. ECF No. 403. Invoking the same federal and local rules, Corwin also seeks "clarification" of the Court's decision as to the burden of proof necessary to demonstrate the City's liability, arguing that liability will be established if City contractors affirmatively created the hazards that causes his injuries. Id.

Defendant City of New York (the "City") moves for an order pursuant to 28 U.S.C. § 1292(b), permitting it to file an interlocutory appeal to the Court of Appeals for the Second Circuit on the issue of whether New York State public policy prevents the City's enforcement of the Agreement as it applies to CitiBike stations on public roadways. ECF No. 401. In the Opinion and Order, the Court held that such a waiver was contrary to the "public policy of guaranteeing the safety of the users of City streets . . . that underlies its non-delegable duty to keep streets and roadways safe," and therefore found that it was unenforceable as to plaintiffs. Corwin, 2017 WL 816134, at *15.

For the reasons set forth below, all of the motions, including Corwin's motion for clarification and reconsideration, Metro Express and Sealcoat's motion for reconsideration and to amend their answers, NYCBS's motion for reconsideration, and the City's motion for leave to appeal under 28 U.S.C. § 1292(b) are DENIED.

LEGAL STANDARD

"The standards governing a motion for reconsideration under Local Rule 6.3 are the same as those under Federal Rule of Civil Procedure 59(e)." Abrahamson v. Bd. of Educ., 237 F. Supp. 2d 507, 510 (S.D.N.Y. 2002). To prevail on such a motion, "the movant must demonstrate 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" Catskill Dev., L.L.C. v. Park Place Entm't Corp., 154 F. Supp. 2d 696, 701 (S.D.N.Y. 2001) (quoting Doe v. NYC Dep't of Soc. Servs., 709 F.2d 782, 789 (2d Cir. 1983)). "The standard for granting such a motion is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Shrader v. CSX Transp., Inc., 70 F.3d 255, 256–57 (2d Cir.

1995). "[A] motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided." Id. at 257. Likewise, motions for reconsideration cannot be based on arguments not previously raised. See Sequa Corp. v. GBJ Corp., 156 F.3d 136, 144 (2d Cir. 1998) ("Rule 59 is not a vehicle for . . . presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite at the apple.'").

ANALYSIS

I. Metro Express and Sealcoat's Motions for Reconsideration

In support of their motion for reconsideration, Metro Express and Sealcoat argue that any negligence claims maintained against them by Corwin should be released by virtue of the Release Agreement because the Agreement applied by its terms to "agents" of the City and NYCBS, and they were in an agency relationship with NYCBS. An essential characteristic of an agency relationship is that the agent acts subject to the principal's direction and control. In re Shulman Transp. Enterprises, Inc., 744 F.2d 293, 295 (2d Cir. 1984). Under New York law, "an agent must have authority, whether apparent, actual or implied, to bind his principal." Merrill Lynch Interfunding, Inc. v. Argenti, 155 F.3d 113, 122 (2d Cir. 1998). Demonstrating actual authority requires "the following elements: (1) manifestation by the principal that the agent shall act for him; (2) the agent accepted the undertaking; and (3) an understanding between the parties that the principal is to be in control of the undertaking." Spagnola v. Chubb Corp., 264 F.R.D. 76, 89 (S.D.N.Y. 2010) (citations omitted). Apparent authority requires "words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction." Standard Funding Corp. v. Lewitt, 89 N.Y.2d 546, 551 (1997).

Nevertheless, "[n]ot all relationships in which one person provides services to another satisfy the definition of agency." Artists Rights Enf't Corp. v. Estate of King, No. 16-CV-1121 (JPO), 2016 WL 7192093, at *4 (S.D.N.Y. Dec. 12, 2016) (citing Restatement (Third) of Agency § 1.01 (2006)). Corwin, the City, and NYCBS argue that Metro Express and Sealcoat were not agents of NYCBS and suggest that they were independent contractors. The fact that Metro Express had some form of contractual relationship with NYCBS to perform services does not automatically indicate that it was NYCBS's agent. See Tartaglione v. Shaw's Express, Inc., 790 F. Supp. 438, 441 (S.D.N.Y. 1992) (distinguishing agent from independent contractor who "in exercising an independent employment . . . is not subject to the control of the [person with whom he has contracted], except as to the result of his work") (citation omitted).

Metro Express and Sealcoat rely extensively on Vornado Realty Trust v. Marubeni Sustainable Energy, Inc., 987 F. Supp. 2d 267 (E.D.N.Y. 2013), where the district court applied a release, containing similar "agent" language, negotiated between a property owner and a contractor to a subcontractor. That case, however, is readily distinguishable. That court was able to determine that "no reasonable jury could fail to conclude the [the subcontractor] was the agent of the [contractor]" and that "there are no genuine issues of material fact as to whether an agency relationship existed between [the two parties]." Id. at 281. Vornado Realty Trust certainly does not stand for the proposition that all subcontractors are agents of their general contractors, and the court's decision was rooted in specific document and deposition discovery regarding the parties' intent and the scope of the release. Id. at 273–74.[2]

[2] For this reason, the Court cannot, as Metro Express and Sealcoat suggest, simply apply the "law of the case doctrine" to find that the release applies to them because it has already found that it is valid as to NYCBS. While NYCBS is indisputably a "Released Person" under the Agreement, the Court's Opinion and Order made no findings as to whether Metro Express and Sealcoat were "agents" of the City or NYCBS.

The Court need not, however, wade into the complex "mixed question of law and fact," Commercial Union Ins. Co. v. Alitalia Airlines, S.p.A., 347 F.3d 448, 462 (2d Cir. 2003), in determining whether or not Metro Express or Sealcoat were agents of the City or NYCBS. It is clear that both defendants waived any claim that the Release Agreement barred Corwin's claims against them by failing to raise it as an affirmative defense in their answers and/or failing to move to amend their answers in a timely fashion to include such a defense. Because they did not raise the Release Agreement as an affirmative defense, no party had any incentive to conduct discovery into the presence or absence of an agency relationship between Metro Express, Sealcoat, and NYCBS or any other defendant. The Court is constrained to deny their eleventh-hour, post-summary judgment motion to amend their answers to remedy this deficiency, because such an amendment would cause substantial prejudice to the remaining parties.

A. Metro Express and Sealcoat's Deficient Answers

On February 22, 2016, Sealcoat filed its answer, alleging a Seventh Affirmative Defense that "[t]he plaintiffs' actions are barred by the doctrine of waiver, estoppel, laches, and/or ratification." ECF No. 211. On February 23, 2016, Metro Express filed an answer raising as its Eighth Affirmative Defense that "[p]laintiff's claims are barred by the applicable statute(s) of limitation and/or the doctrine of laches, waiver and/or estoppel" and as its Tenth Affirmative Defense that "[p]laintiffs' claims are barred by the doctrines of waiver and/or estoppel." ECF No. 213 at ¶¶ 453, 455. As Corwin argues, while these affirmative defense make a general reference to "waiver," they are reasonably construed to refer to defenses grounded in undue delay or conduct inconsistent with Corwin's claims, not those relating to an exculpatory release agreement.

Metro Express and Sealcoat were fully aware of the contents of the Release Agreement at issue. Corwin affirms that the Release Agreement was provided as an exhibit to these defendants before their joinder in this case as early as October 30, 2015, months before their answer was due. Pls.' Opp. Mem, ECF No. 417 at 9–10. Corwin's Local Civil Rule 56.1 Statement, submitted in support of his summary judgment motion, alleged that neither Metro Express nor Sealcoat was an agent or otherwise a "Released Person" under the terms of the Release Agreement (ECF No. 310 at ¶¶ 37–38), and neither defendant submitted a counter-statement to this statement. Therefore, these statements were deemed admitted for the purpose of the summary judgment motion. See S.D.N.Y. Local Civil Rule 56.1(c) ("Each number paragraph in the [56.1 Statement] will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.")

B. Metro Express and Sealcoat's Tardy Motions to Amend their Answers

Federal Rule of Civil Procedure 15(a) provides that leave to amend "shall be freely given when justice so requires." In general, "[t]he rule in this Circuit has been to allow a party to amend its pleadings in the absence of a showing by the nonmovant of prejudice or bad faith." Block v. First Blood Assocs., 988 F.2d 344, 350 (2d Cir. 1993); see also State Teachers Ret. Bd. v. Fluor Corp., 654 F.2d 843, 856 (2d Cir. 1981) ("Reasons for a proper denial of leave to amend include undue delay, bad faith, futility of the amendment, and perhaps most important, the resulting prejudice to the opposing party."). Absent a showing of bad faith or undue prejudice, "mere delay . . . does not provide a basis for a district court to deny the right to amend." Ruotolo v. City of New York, 514 F.3d 184, 191 (2d Cir. 2008) (quoting State Teachers, 654 F.2d at 856). In determining what constitutes "prejudice," courts consider whether the assertion of the new claim would: (i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the plaintiff from bringing a timely action in another jurisdiction. Block, 988 F.2d at 350 (citations omitted). "[T]he longer the period of an unexplained delay, the less will be required of the nonmoving party in terms of a showing of prejudice." Evans v. Syracuse City Sch. Dist., 704 F.2d 44, 47 (2d Cir. 1983). Therefore, a district court may "deny leave to amend where the motion is made after an inordinate delay, no satisfactory explanation is offered for the delay, and the amendment would prejudice the defendant." Cresswell v. Sullivan & Cromwell, 922 F.2d 60, 72 (2d Cir. 1990).

Metro Express and Sealcoat have offered no explanation for their inexplicable failure to assert this defense in a remotely timely fashion. In addition to the months of discovery that preceded summary judgment motion practice, there were at least four separate motions for summary judgment that exhaustively briefed the issue of whether the Release Agreement was enforceable. These motions were fully briefed as of November 3, 2016. Only at oral argument on January 12, 2017, upon direct questioning by the Court, did either Metro Express or Sealcoat even intimate that they may be covered by the Release Agreement. ECF No. 422 at 50–53. But at no point during discovery, during summary judgment briefing, or after oral argument did Metro Express or Sealcoat move to amend their answer to add the relevant affirmative defenses in line with the arguments asserted by their fellow defendants.

It is obvious that allowing these defendants leave to amend their complaint less than two months before trial would unduly prejudice Corwin and the other defendants. As stated above, the question of whether Metro Express and Sealcoat were "agents" of the City or NYCBS is a mixed question of law and fact. The fair resolution of such a question would require discovery into the drafting of the Release Agreement, the intended scope of the word "agent" therein, and nature of the relationship between these defendants. Instead, their failure to plead the affirmative defense meant that, as Corwin argues, "there was no need to conduct discovery on a defense not asserted." Pls.' Opp. Mem, ECF No. 417 at 12. The taking of such discovery would now be impossible, and unduly delay the trial date in a case that is now over three years old. Cf. Morse/Diesel, Inc. v. Fid. & Deposit Co. of Maryland, No. 86-CV-1494 (DLC), 1995 WL 358627, at *6 (S.D.N.Y. June 15, 1995) ("Permitting the amendment at this point would require reopening discovery . . . and delaying the trial date. Under no circumstances will the Court permit the trial date in this action to move. The undue prejudice to [plaintiff] if the amendment were permitted, by itself, requires denial of the amendment.").

Metro Express argues that despite their failure to raise the Agreement as an affirmative defense, as a matter of fact, "there was an abundance of discovery concerning NYCBS'[s] relationship with Metro Express" that would permit the parties and the Court to determine that it was NYCBS's agent. Metro Express/Sealcoat Reply Mem., ECF No. 432 at 2. It references numerous facts in the record that suggest a high level of control by NYCBS, and notes the extensive depositions taken of its General Manager, as well as those NYCBS employees who communicated with the General Manager most frequently. Id. at 4. Sealcoat further argues that the record shows that it is an agent under the doctrine of subagency. Restatement (Third) of Agency § 3.15 (2006).

The mere fact that significant discovery was conducted regarding the relationship between Metro Express/Sealcoat and NYCBS does not erase the prejudice to Corwin and the other parties. Whatever their motivation for seeking extensive discovery into the NYCBS-Metro Express/Sealcoat relationship, it was indisputably not tied to their status under the Release Agreement because such an affirmative defense was never raised.

Accordingly, because Corwin and the other parties to this case would be unfairly prejudiced by Metro Express and Sealcoat's proposed amendment to their answers, and because they have offered no explanation for the undue delay in making their motion, Metro Express and Sealcoat's motion to amend their answer and their motion for reconsideration are DENIED. Because Corwin may maintain common-law negligence claims against them, Metro Express and Sealcoat's motion for joinder in NYCBS's motion for reconsideration regarding gross negligence is DENIED as moot.

II. Corwin's Motion for Reconsideration

A. Clarification of Burden of Proof for the City's Liability

Corwin first argues that the Court erred in using language in its Opinion and Order suggesting that the City may only be found liable through the affirmatively negligent actions of its employees, and not through affirmatively negligent actions of its contractors and subcontractors. In his view, the Opinion and Order should reflect "that the City may be held to have affirmatively create a hazardous roadway condition strictly through the actions of its contractors and subcontractors." Pls. Mem at 7, ECF No. 405.

The language in the Opinion and Order with which Corwin quibbles is the section in which the Court determined that there was a genuine dispute of material fact as to whether the City was affirmatively negligent so as to lose the written notice protections of § 7-201(c)(2), popularly known as the "Pothole Law." Corwin certainly does not ask the Court to reconsider that conclusion, which is favorable to him. At the summary judgment stage, the Court needed to do no more, as its task was "carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them." Gallo v. Prudential Residential Servs., LP, 22 F.3d 1219, 1224 (2d Cir. 1994). Indeed, the Court concluded that the available evidence "could lead a reasonable finder of fact to conclude that either the specific wheel stop in question, or all wheel stops that enter into the foreseeable pathway of a cyclist, were installed pursuant to affirmative acts of negligence by the City." Corwin, 2017 WL 816134, at *22. The Court's decision did not describe, nor should it have described, the types of evidence necessary to prove the City's liability or plaintiff's burden of proof at trial. These questions are appropriately raised at a jury charge conference, not in a request to "clarify" or revise a summary judgment decision limited to identifying genuine disputes of material fact for trial.

Accordingly, Corwin's request to "clarify" this portion of the Opinion and Order is DENIED.

B. Definitions of "Services," "Stations," "Related Information," and "Related Equipment" in the CitiBike User Agreement

Corwin argues that the Court failed to scrutinize properly the language of the Release Agreement, and that had it done so, it would have concluded that the wheel stop and other "street treatments" were "public road conditions" that were neither "services," "stations," "related information," or "related equipment" as defined in the Agreement. In support of his argument, Corwin cites to definitions in Paragraph 1.15 and 1.41 of the agreement between the City and NYCBS, which appears to define "station" and "equipment" in a way that excludes street treatments such as wheel stops.

Whatever the merits of this argument, it is a novel contract interpretation theory that was not raised during the extensive summary judgment briefing on the very question of the applicability and enforceability of the Release Agreement. There has plainly been no "intervening change of controlling law" nor has "new evidence" arisen that was previously unavailable to Corwin. Summary judgment briefing is not an iterative process, and a motion for reconsideration is "not a vehicle for . . . presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite at the apple.'" Sequa Corp., 156 F.3d at 144. Corwin may not raise new theories on reconsideration, merely because the theories he argued regarding the Release Agreement on summary judgment proved unsuccessful.

Accordingly, because Corwin's argument was not raised during the briefing, either in support of his own motion for partial summary judgment or in opposition to the defendants' motion, he has not met the requirements to raise the issue on a motion to reconsideration. Therefore, the motion for the Court to reconsider its decision regarding the scope of the Release Agreement is DENIED.

C. New York City Administrative Code § 19–110

Corwin argues that the Court failed to apply controlling law in finding that New York City Administrative Code ("NYCAC") § 19–110 did not provide him with a private right of action that could not be released by a contractual waiver clause by reasons of public policy. In support of this argument, Corwin attaches a voluminous appendix of legislative history dating back to 1839 that he alleges indicates that a private right of action should be implied.

Even assuming that Corwin's argument is properly raised on a motion for reconsideration (a dubious proposition, given that this legislative history evidence was available and not proffered during the briefing of the summary judgment motions), the fact that the statute, in various iterations, has been part of New York law since 1839 is a powerful argument against Corwin's position. Surely, in the nearly 180 years of the statute's existence, many individuals have been harmed by negligent contractors performing work pursuant to permits on New York City streets. The fact that Corwin cannot cite to a single federal or state court decision that has interpreted the statute to provide an implied right of action against such contractors supports the Court's construction that NYCAC § 19–110 does no more than provide that "the City may seek contribution for damages to third parties occasioned by a negligent contractor or property owner conducting work pursuant to a municipal permit." Corwin, 2017 WL 816134, at *10.

Finally, even if the Court were to ignore the weight of almost two hundred years of judicial silence on this question and imply a private right of action, it could not possibly conclude that this was a non-waivable "public policy." In finding that the City's duty to keep its streets in a reasonably safe condition could not be waived as a matter of public policy, the Court relied on the sound jurisprudential foundation of centuries of New York state court decisions that spoke of an "absolute" duty that could not be delegated to third parties. See, e.g., Storrs v. City of Utica, 17 N.Y. 104, 108–09 (1858) (finding that municipal corporations "owe[ ] to the public the duty of keeping its streets in a safe condition for travel" and "although the work may be let out by contract, the corporation still remains charged with the care and control of the street in which the improvement is carried on . . . [and cannot] either avoid indictment in behalf of the public or its liability to individuals who are injured.") No similar basis exists with regards to NYCAC § 19–110.

Accordingly, the motion for the Court to reconsider its decision regarding the applicability of NYCAC § 19–110 is DENIED.

III. NYCBS's Motion for Reconsideration

NYCBS argues that the Court should reconsider its decision that summary judgment was not appropriate on Corwin's gross negligence claims, which are the only surviving claims against it. It contends that there are no facts that could meet New York's exacting standards to prove gross negligence, which require "conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing." Am. Tel. & Tel. Co. v. City of New York, 83 F.3d 549, 556 (2d Cir. 1996) (quoting Colnaghi, U.S.A., Ltd. v. Jewelers Prot. Servs., Ltd., 81 N.Y.2d 821, 823–24 (1993)). Specifically, NYCBS states that it was not responsible for creating the plans and specifications for the bike share stations to which Corwin's expert ng . Green objects, which was done by the City and the architecture and design firm Alta Planning + Design, Inc. ("APD"). Therefore, according to NYCBS, even if Mr. Green's conclusions regarding the station design are wholly correct (which it contests), its reliance on the City and APD's expert opinions could not have been grossly negligent as a matter of law.[3]

Corwin responds that there are a number of facts in the record that could support a finding of gross negligence, such as, *inter alia*, NYCBS's inability to explain why the installation deviated materially from the approve plan prepared by APD, the lack of a validation process to compare approved plans with actual installations, NYCBS's ignoring numerous complaints about injuries occasioned by wheel stops and failure to keep track of such complaints, the fact that the Station where Corwin's accident occurred was opened to the public without any inspections, because no safety inspection protocol was in place, and NYCBS's failure to supervise contractors such as Metro Express, despite the fact that they knew they were chronically behind schedule and/or potentially failing to comply with approved site plans.

"New York courts set the bar quite high . . . demanding nothing short of . . . a compelling demonstration of egregious intentional misbehavior evincing extreme culpability: malice, recklessness, deliberate or callous indifference to the rights of others, or an extensive pattern of wanton acts." Deutsche Lufthansa AG v. Boeing Co., No. 06-CV-7667 (LBS), 2007 WL 403301, at *3 (S.D.N.Y. Feb. 2, 2007) (citations omitted). NYCBS's moving papers focus primarily on the allegations made by Corwin's expert James M. Green and argue that because NYCBS was relying on allegedly negligent advice provided by design professionals from APD and the City, it could not possibly have had the requisite level of culpability necessary for a finding of gross negligence. The Court agrees that, given the undisputed fact that NYCBS relied on these design professionals in implementing the installation of stations and accompanying street treatments, there is no evidence in the record that could lead a reasonable factfinder to conclude that NYCBS's conduct in relying on the design professionals' site plans met New York's exacting gross negligence standard. As NYCBS argues, demonstrating "ignorance once removed" does not demonstrate the "extreme culpability" necessary to prove gross negligence under New York law based on its reliance on advice from design professionals. NYCBS Mem., ECF No. 402-1, at 1. Therefore, upon reconsideration of the record, the Court's statement in Corwin that NYCBS could be found grossly negligent at trial if it is found "to have unjustifiably ignored sound engineering practices and placed camouflaged wheel stops in the direct and foreseeable paths of cyclists" is withdrawn. Corwin, 2017 WL 816134, at *28.

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[3] NYCBS also raises a challenge towards Mr. Green's expert testimony under Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), arguing that because there were no generally accepted engineering design standards for on-street bike share facilities, Mr. Green's assertions that the standards, bike corrals, and parking areas were applicable to such facilities was arbitrary *ipse dixit*. Because this argument was available to the parties but not raised during the summary judgment briefing, the Court cannot consider it on a motion for reconsideration. " See Sequa Corp., 156 F.3d at 144.

This does not, however, fully resolve the issue. Construing the evidence in the record in the light most favorable to the nonmoving party, as is appropriate in evaluating a summary judgment motion, the Court finds that its determination that "a reasonable factfinder could conclude that [NYCBS's] conduct was sufficiently reckless and/or aggravated to meet the gross negligence standard" remains valid. Corwin, 2017 WL 816134, at *28. Wholly apart from whether NYCBS reasonably relied on the City and APD's engineering guidance, NYCBS owned, operated, and maintained the Citi Bike program. Corwin has alleged that NYCBS wholly failed to have any process that ensured that Citi Bike stations as built actually conformed to the site plans, had no inspection process in place before opening stations to the general public, and entirely failed to supervise its contractors—both generally and in regards to the station with the allegedly unauthorized wheel stop where his accident occurred. Given that NYCBS was charged with administering a popular public program used by over a million users, which involved installing potentially hazardous equipment on public thoroughfares, the jury could find that a failure to institute such protections constitutes "a reckless disregard for the rights of others."

Accordingly, although the Court reconsiders its initial language about the nature of the evidence necessary to prove NYCBS's gross negligence, because a genuine issue of material fact continues to exist regarding whether NYCBS was grossly negligent, NYCBS's motion for reconsideration is otherwise DENIED. The jury will be charged appropriately under New York's exacting standard of gross negligence.

IV. The City's Motion for Leave to File an Interlocutory Appeal

A. Legal Standard

Section 1292(b) provides for certification of an order for interlocutory appeal when the court determines: "(1) that such order involves a controlling question of law (2) as to which there is a substantial ground for difference of opinion and (3) that an immediate appeal from [that] order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The Court of Appeals for the Second Circuit has, however, made clear that interlocutory appeals are disfavored, and are "a rare exception to the final judgment rule that generally prohibits piecemeal appeals." Koehler v. Bank of Bermuda Ltd., 101 F.3d 863, 865 (2d Cir. 1996); see also McNeil v. Aguilos, 820 F.Supp. 77, 79 (S.D.N.Y. 1993) (Sotomayor, J.) ("'These three prerequisites create a significant hurdle to certification, and the barrier is only elevated by the mandate that section 1292(b) be 'strictly limited' because 'only exceptional circumstances [will] justify a departure from the basic policy of postponing appellate review until after the entry of a

final judgment.'") (citing Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d 21, 25 (2d Cir. 1990)); Westwood Pharm., Inc. v. Nat'l Fuel Gas Distribution Corp., 964 F.2d 85, 89 (2d Cir. 1992) (urging "district courts to exercise great care in making a § 1292(b) certification").

"Courts place particular weight on . . . whether immediate appeal will materially advance the ultimate termination of the litigation." Florio v. City of New York, No. 06-CV-6473(SAS), 2008 WL 3068247, at *1 (S.D.N.Y. Aug. 5, 2008); see also Koehler, 101 F.3d at 865–66 ("The use of § 1292(b) is reserved for those cases where an intermediate appeal may avoid protracted litigation."). "An immediate appeal is considered to advance the ultimate termination of the litigation if that appeal promises to advance the time for trial or to shorten the time required for trial." Florio, 2008 WL 3068247, at *1 (citations omitted).

B. Application

The City argues that the Court's decision that it could not waive its non-delegable duty to keep streets and roadways safe by means of a contractual release is ripe for certification of an interlocutory appeal to the Court of Appeals.

There is no question that the first two statutory criteria are met in this case. First, "[a] controlling question of law exists if: (1) reversal of the district court's opinion could result in dismissal of the action, (2) reversal of the district court's opinion, even though not resulting in dismissal, could significantly affect the conduct of the action, or (3) the certified issue has precedential value for a large number of cases." Flo & Eddie, Inc v. Sirius XM Radio Inc., No. 13-CV-5784 (CM), 2015 WL 585641, at *1 (S.D.N.Y. Feb. 10, 2015) (citation omitted). In this case, a finding that the City may enforce the Release Agreement would lead to the dismissal of Corwin's negligence claims against the City, which would "significantly affect the conduct of the action." Second, a substantial ground for difference of opinion exists when "(1) there is conflicting authority on the issue, or (2) the issue is particularly difficult and of first impression for the Second Circuit." In re Facebook, Inc., IPO Sec. & Derivative Litig., 986 F. Supp. 2d 524, 539 (S.D.N.Y. 2014) (citation omitted). As the Court readily acknowledged in its Opinion and Order, the question decided is indeed an issue of first impression, and "[n]o case has considered the specific question of whether a municipality's duty to keep its streets in a reasonably safe condition for travel can be waived by contract." Corwin, 2017 WL 816134, at *14.

Section 1292(b) is not, however, a mere safety valve for district courts to avoid deciding difficult questions. See Koehler, 101 F.3d at 865–66 (noting that "[i]t is a basic tenet of federal law to delay appellate review until a final judgment has been entered"); see also id. at 864 (referring to "§ 1292(b)'s intended purpose" as that of allowing the Court of Appeals "to rule on an ephemeral question of law that may disappear in the light of a complete and final record.").

In this case, it is plain that permitting an interlocutory appeal at this juncture, on the very eve of trial, would severely delay the termination of the litigation. Such an appeal would lead to the proceedings being stayed, potentially for years, as to all parties. On the contrary, proceeding to trial and final judgment would lead to a prompt finding as regards to liability and damages as to all the defendants remaining in the case, while preserving the City's ability to appeal in the ordinary course on the question of law it identifies in the event that it is found liable. See, e.g., Century Pac., Inc. v. Hilton Hotels Corp., 574 F. Supp. 2d 369, 373 (S.D.N.Y. 2008) (denying certification where "it appears more likely that the granting of an immediate appeal will . . . prolong[] litigation"); In re World Trade Ctr. Disaster Site Litig., 469 F. Supp. 2d 134, 145 (S.D.N.Y. 2007) (denying certification where "substantial delay is a likely consequence of interlocutory appeal at this stage in the litigation").

Accordingly, because the City cannot demonstrate that an interlocutory appeal would "materially advance the termination of the litigation" to overcome the presumption that the final judgment rule applies, the City's motion for leave to file an interlocutory appeal under 28 U.S.C. § 1292(b) is DENIED.

CONCLUSION

The motions for reconsideration filed by plaintiffs Ronald D. Corwin and Beth Blumenthal, Metro Express Services, Inc., Sealcoat USA, Inc., NYC Bike Share, LLC, and Alta Bicycle Share, Inc./Motivate International are all DENIED. The motions to amend their answers filed by Metro Express Services, Inc. and Sealcoat USA, Inc. are DENIED. The City of New York's motion for leave to file an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is DENIED. Insofar as the Court has denied Metro Express Services, Inc. and Sealcoat USA, Inc. motions for leave to amend and reconsideration, their motion for joinder to NYC Bike Share, LLC, and Alta Bicycle Share, Inc./Motivate International's motion for reconsideration is DENIED as moot.

The Clerk of Court is respectfully requested to close Dkt. Nos. 400, 401, 402, 403, and 406.

SO ORDERED.

SARAH NETBURN
United States Magistrate Judge

DATED: New York, New York
April 7, 2017